## CORRESPONDENCE.

### CATTLE-GUARDS.

*Editor Virginia Law Register:*

It is to be regretted that the case reported and commented upon in your June number, by Messrs. Kirkpatrick and Mann, from the Circuit Court of Campbell county, relative to cattle-guards, could not have been passed upon by the Court of Appeals. I do not believe that the construction put upon section 1262 of the Code of Virginia, by Judge Whittle, should go unchallenged, or pass for the law of the State. Of course, we have no way of knowing how many of the circuit courts would be influenced by this opinion of the learned judge, but I do not believe the bar of the State will concur in the conclusion reached, nor can I think he would be affirmed by the Supreme Court of Appeals. I refer especially to the instruction that defines the sufficiency of a cattle-guard under section 1262. I do not mean, either, to pass upon the merits of the case reported, but I protest vehemently against the construction of the law indicated in the article of these learned brethren, who, I suppose, represented the railroad company. I say "indicated," for they do not say they approve it.

The language of section 1262 is: "It shall be the duty of every railroad company whose road passes through enclosed lands, to construct and keep in good repair, cattle-guards sufficient to prevent the passage of stock of every kind over such land at any place where a fence may be necessary and proper." Judge Whittle's instruction No. 2 inserts the word "reasonable" before "sufficient." In doing this, the court usurped the function of the legislature, or rather became legislative. The circuit judge goes further; he not only legislates himself, but he permits the railroad companies of the country to do the same. He says the duty is performed when the company "erects and maintains cattle-guards which, according to the usage of standard railroads, are deemed reasonably sufficient for the purpose aforesaid." And further: "If the jury finds the cattle-guards . . . are of the kind in use upon the standard railroads of the country, they must find for the defendant." This in the teeth of a statute that says they "*must be sufficient to prevent the passage of stock of every kind on such land.*" Can the usage in a State where there is no statute on the subject, or a statute different from ours, determine what shall be sufficient in Virginia? Shall the usage of railroads in Oregon and Texas annul the plain meaning of a mandatory statute, as umambiguous as the one under consideration? This cannot be true, for the usage in different States would be as varied as the statutes. The court in Virginia has no discretion. It can only instruct the jury whether a cattle-guard is "sufficient" to prevent stock from passing.

The *rationale* of the law is, I take it, this: The railroad, when it is constructed, passes at places through enclosed land. To do that, it necessarily breaks the continuity of fences. The law presumes these fences to be *lawful fences*, and a lawful fence turns stock. The State says to the railroad company: "You, by building your railroad, injure the citizen through whose enclosed land you pass, to the extent of making it possible for stock to pass from one enclosure to another, where

before it could not, unless you put something in the place of the fence; if you wish the privilege of taking down the citizen's fence, you must substitute a cattle-guard in its stead, that will as effectually prevent the passage of stock as the *lawful fence.*"

This cattle-guard, in the contemplation of our statute, is a complete bar to the passage of stock along the railroad's track where it passes through enclosed lands, and the only legitimate inquiry for the court is the *sufficiency* of the cattle-guard for this purpose. If the railroad says, as it seems in this case so successfully to have urged upon the court, that it cannot do it with consistency to its other duties to the public, then it may be answered: "That is your lookout; and since you ask to put the citizen in the danger of the loss of his property, you must assume that peril yourself, as one of the risks of your undertaking." It is but the application of the doctrine of *sic utere tuo ut alienum non laedas.*

D. C. O'FLAHERTY.

*Front Royal, Va.*

---

SET-OFF AGAINST A SET-OFF.

*Editor Virginia Law Register:*

In a recent action of assumpsit in the Corporation Court of Danville, upon a contract between plaintiff and defendant, to recover defendant's part of certain expenses provided for by the contract, the defendant pleaded by way of set-off items of expense which the plaintiff contended did not come within the purview of the contract; but if the court held defendant's items so pleaded to be good, then there were like items claimed by the plaintiff and not embraced in his account sued upon, which he desired to plead by way of *counter set-off.* The court refused to allow the plaintiff, in his replication to the plea of set-off, to assert his counter set-off, and held that the plaintiff must amend and enlarge his account filed with his declaration. This the plaintiff refused to do, because if he did so he would be estopped from objecting that the items covered by defendant's plea did not come under the contract sued upon. In fact, the court, ruled out of the case these items set up by defendant's plea, and therefore the question will not arise before the Supreme Court, where the case is to go upon other questions. But we submit to you and to your readers the interesting inquiry whether, in Virginia, a plaintiff cannot, to a plea of set off, interpose by way of replication, *counter set-offs.* We observe that in West Virginia the point has been provided for by statute. *Vide* 1 Barton Law Pr. p. 506, note 3.

*Quaere:* Irrespective of statute, why cannot this be done in Virginia? It seems to us that, as under the statute the defendant's plea is tantamount to his bringing a suit, the same defenses should be allowed the plaintiff as if there were an independent suit for the amounts claimed by way of set-off.

BERKELEY & HARRISON.

*Danville, Va.*